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CASES CITED

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IN THE

Supreme Court of the United States

October Term, 1972

No.

CHARLES J. DEMOULIN, PATRICIA DEMOULIN, JEANNE E. SHANNON, BARBARA A. RUTHERFORD, SALLY SNELLING, WAYNE KNOX, VIRGINIA KUHN, and WILLEY SMITH,
Petitioners,

VS.

THE CITY AND COUNTY OF DENVER, a body politic and corporate; PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation; and JAMES T. BAYER, F. JAMES VOSS, and F. J. SERAFINI, election commissioners for THE CITY AND COUNTY OF DENVER,
Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Colorado entered in this case on April 17, 1972.

Citations to Opinions Below

The opinion of the Supreme Court of Colorado is *DeMoulin v. City and County of Denver,* 495 P.2d 203 (Colo. 1972). As yet the opinion has not been printed in the official *Colorado Reports.* A copy of this opinion is printed in Appendix A.

Jurisdiction

The opinion of the Supreme Court of Colorado was dated January 24, 1972. Judgment was entered and rehearing was denied on April 17, 1972. No order granting any extension of time within which to petition for writ of certiorari has been entered. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1257(3).

Question Presented

Whether the City and County of Denver may constitutionally deny qualified electors who have not paid a property tax the right to vote on the question of granting a franchise to the Public Service Company of Colorado, in the absence of proof that the result of the election could have been different if all the electors who were not allowed to vote on the question of the franchise had been permitted to do so.

Constitutional and Charter Provisions

The provision of the *United States Constitution* that is involved is the equal protection clause of the Fourteenth Amendment. The provision of the *Colorado Constitution* that is involved is Art. XX §4. The provision of the *Charter of the City and County of Denver* that is involved is *Denver Charter* §C3.1. These constitutional and charter provisions are printed in Appendix B.

Statement

The petitioners are qualified electors of the City and County of Denver who owned no real estate and who, therefore, had paid no property tax to the City and County of Denver. Because the petitioners had paid no property tax, the City and County of Denver prohibited them from voting in a special election held on February 7, 1967 on the ques-

tion of whether the City and County would grant the Public Service Company of Colorado a 20-year franchise to use the public streets for the distribution of electricity, gas, and steam.

The Public Service Company of Colorado won the election by a vote of 66,566 to 10,035.

At the time of the election, 204,687 citizens were registered voters in the City and County of Denver. Of these 204,687 electors, 91,691 voted in the election. Of the 91,691 electors who voted, only 76,601 voted on the question of the Public Service Company franchise, 66,566 for it and 10,035 against it. Thus 15,090 electors were allowed to vote on the other propositions that were on the same ballot but not on the question of the Public Service Company franchise; these 15,090 electors presumably were not property taxpayers.

Before the election, the Public Service Company conducted a massive newspaper, radio, television, and door-to-door advertising campaign telling the electors that they had no right to vote if they were not property taxpayers. This intense publicity blanketed the City and County of Denver for several weeks.

On March 14, 1967, the petitioners filed a class action in the District Court for the City and County of Denver to void the election and to salvage their right to vote. On March 19, 1969, the trial court dismissed the petitioners' complaint. The petitioners perfected their writ of error to the Supreme Court of Colorado; the Supreme Court of Colorado affirmed the trial court. In its opinion dated January 24, 1972, the Supreme Court of Colorado stated:

> The trial court ruled . . . that relief of voiding the election could not be granted because there was

> no allegation and showing that, absent the illegality, the result would have been otherwise.
>
> We agree with this latter ruling, except that the allegation and showing need only be that the result *could* have been, and not *would* have been, otherwise . . . If the 15,090 who were not allowed to vote on the franchise had been permitted to do so, and all had voted against it, the franchise would still have been approved. [Italics by the Court.]

Meanwhile, the Supreme Court of the United States had decided *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 on June 16, 1969, *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 on June 16, 1969, and *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 on June 23, 1970. These cases held that the equal protection clause of the Fourteenth Amendment forbids states to discriminate between electors who have paid property taxes and electors who have paid no property taxes. The Supreme Court of Colorado, citing *Cipriano* and *Kramer* but not *Kolodziejski*, held that *Cipriano* and *Kramer* were not controlling because the petitioners had not proven that the outcome of the election could have been different if the City and County of Denver had not prohibited electors who had paid no property tax from voting. Thus the Colorado Supreme Court said that a city can deny electors who have paid no property tax the right to vote in all elections, except when such electors are able to go to court and prove that the result of the election could have been different if the city had not denied them the right to vote. The Supreme Court of the United States recognized no such limitation on the equal protection clause or on the right to vote in either *Cipriano*,

Kramer, or *Kolodziejski;* no language in either *Cipriano*, *Kramer*, or *Kolodziejski* even faintly suggested that the equal protection clause applies or that the right to vote exists only if someone can prove that his side could have won the election. The effects of the decision of the Supreme Court of Colorado, if upheld, are that 15,090 or more electors lost their right to vote on the Public Service Company franchise and that these voters will not have an opportunity to vote again on this question until Public Service Company franchise expires in 1987.

When Federal Question Raised

The petitioners raised the federal question in their complaint filed in the District Court for the City and County of Denver, State of Colorado, on March 14, 1967 and subsequently in their amended complaint and motion for new trial filed in the District Court for the City and County of Denver, State of Colorado, and again in their brief filed in the Supreme Court of Colorado.

Reasons for Granting Writ

This petition for writ of certiorari presents a substantial question of federal constitutional law not explicitly decided in *Cipriano*, *Kramer*, or *Kolodziejski*. The Supreme Court of Colorado in deciding this federal question read a new meaning into the equal protection clause by holding that propertyless electors have no right to vote unless they come into court after the election and establish that their ballots would have made a difference in the outcome. In principle, it is the same as if the City and County of Denver had said that 15,090 Negroes would be allowed to vote only if they could subsequently prove in court that their votes could have changed the result.

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Colorado in *DeMoulin v. City and County of Denver*, 495 P.2d 203 (Colo. 1972):

GROVES, Justice.

The parties appear here in the same order as in the trial court. The plaintiffs sought to void a special election held on February 7, 1967. There a 20-year franchise was granted to Public Service Company of Colorado for use of the Denver city streets and public ways for the distribution of electricity, gas and steam. Trial was to the court, which, at the conclusion, dismissed the complaint. We affirm.

Colo. Const. art. XX, § 4 and Denver Charter § C3.1 describe the proper electorate for such an election as "qualified taxpaying electors." Only those who had paid a property tax to the City and County of Denver during the twelve months preceding the election were permitted to vote upon the franchise. Registered, non-taxpaying voters were permitted to vote upon other propositions on the ballot. There were 204,687 registered voters. Of these, 91,691 voted at the special election. There were 76,601 who voted as to the franchise matter and, presumably, the remaining 15,090 were not permitted to vote on that question. The franchise was approved by a vote of 66,566 to 10,035, with 56,531 more "for" votes than those "against."

The plaintiffs contend that the denial of the right to vote on the franchise by non-taxpaying electors is a denial of equal protection under the Fourteenth Amendment. While we do not reach the question, it is noted in passing that Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), and Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583

(1969), which are cited here in support of reversal, were announced subsequent both to the election and the trial court's determination.

The trial court ruled that Denver's election commission improperly defined the term "qualified taxpaying electors." It held, nevertheless, that relief of voting the election could not be granted because there was no allegation and showing that, absent the illegality, the result would have been otherwise.

We agree with this latter ruling, except that the allegation and showing need only be that the result *could* have been, and not *would* have been, otherwise. Suttle v. Sullivan, 131 Colo. 519, 283 P.2d 636 (1955); Clough v. Colorado Springs, 70 Colo. 87, 197 P. 896 (1921); City of Loveland v. Western Light and Power Company, 65 Colo. 55, 173 P. 717 (1918); and Todd v. Stewart, 14 Colo. 286, 23 P. 426 (1890). If the 15,090 who were not allowed to vote on the franchise had been permitted to do so, and all had voted against it, the franchise would still have been approved.

The plaintiffs have argued that advance advertising to the effect that non-taxpaying electors could not vote on the franchise caused many non-taxpayers to fail to go to the polls. These non-voters, they say, might have appeared and defeated the franchise. No showing was made as to how many of the registered voters were not taxpayers; nor was there any evidence that any persons were discouraged from voting by reason of the advance advertising. To be successful, plaintiffs would have to predicate their case upon these showings.

The plaintiffs contend that there was a stipulation between the parties, which eliminated the necessity for plaintiffs to show that the vote could have been different. Both in

their brief and in oral argument the plaintiffs referred to many folio numbers in the record at which such a stipulation could be found. We fail to find any such stipulation at the folio references or in the remainder of the record.

Judgment affirmed.

APPENDIX B

Constitutional and Charter Provisions:

(1) *U.S. Const.* amend. 14: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

(2) *Colo. Const.* Art. XX §4: "No franchise relating to any street, alley or public place of said city and county [of Denver] shall be granted except upon the vote of the qualified taxpaying electors . . ."

(3) *Charter of the City and County of Denver* § C3.1: "No franchise relating to any street, alley or public place of the city and county [of Denver] shall be granted except upon the vote of the qualified taxpaying electors . . ."

APPENDIX C

Portions of the Record Showing When Federal Questions Raised:

(1) Complaint filed in the District Court for the City and County of Denver, State of Colorado, on March 14, 1967:

> THIRD CLAIM FOR RELIEF . . .
>
> 2. If the Court determines "qualified taxpaying elector" as used in the Colorado Constitution, Ar-

ticle Twenty (20), Section Four (4) pertaining to franchise elections means only those qualified electors who paid an *ad valorem* tax in the twelve months next preceding the election, then that Colorado Constitutional requirement must fall as being in violation of the Fourteenth (14th) Amendment to the United States Constitution.

(2) Amended complaint filed in the District Court for the City and County of Denver, State of Colorado, on September 11, 1967:

. . . SECOND CLAIM FOR RELIEF . . .

I

If the Court determines that the phrase "qualified taxpaying elector" as used in Art. III §C3.1 of the CHARTER OF THE CITY AND COUNTY OF DENVER and Art. XX §4 of the *Colorado Constitution* means only qualified electors who have paid an *ad valorem* tax to the CITY AND COUNTY OF DENVER within the twelve months immediately preceding the election, then Art. III §C3.1 of the CHARTER OF THE CITY AND COUNTY OF DENVER and Art. XX §4 of the *Colorado Constitution* must fall because they contravene . . . the Fourteenth Amendment to the *United States Constitution.*

(3) Motion for new trial filed in the District Court for the City and County of Denver on March 31, 1969:

(3) The Court erred in refusing to enjoin the defendant City and County of Denver from issuing a franchise to the defendant Public Service Company of Colorado until the defendant City and

County of Denver holds a valid election on the issue of such franchise in which all persons legally entitled to vote on said issue are permitted to do so. . . .

(6) The Court erred in holding that the Court does not have the power or authority to annul or declare void an election except on a showing that said election was illegally conducted and that as a result of said illegality the true will of the majority was not expressed and that but for such alleged illegality the result of the elction [*sic*] would have been otherwise.

(7) The Court erred in holding that it was necessary for the plaintiffs to allege and prove that the size of the class they represented was large enough to affect the results of the franchise election if the class had been permitted to vote.

(8) The Court erred in holding that it did not have the power to provide any remedy for the disenfranchised voters in the absence of proof by the plaintiffs that if the election were held again the result would be different.

(4) Brief of the plaintiffs in error filed in the Supreme Court of Colorado on November 14, 1969:

II. SUMMARY OF ARGUMENT.

A. Did the defendants' restriction of the right to vote to property taxpayers deny the plaintiffs and other nonproperty taxpayers the equal protection of the law guaranteed by the *U.S. Const.* amend. 14 . . . ?

. . .

C. Must the plaintiffs, in order to secure their right to vote, be able to establish after the election that their votes would have changed the outcome?